Filed 12/4/13 In re Matthew D. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re MATTHEW D. et al., Persons Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY CHILDREN AND FAMILY SERVICES BUREAU, Plaintiff and Respondent, v. AMY C., Defendant and Appellant.	A137345 (Contra Costa County Super. Ct. Nos. J11-00542 and J11-00543)

Amy C. appeals from orders terminating her parental rights to her twin sons, Adam D. and Matthew D. She contends the juvenile court erred in denying her motion for a continuance and in terminating her parental rights without compliance with the Indian Child Welfare Act (ICWA). We agree with the latter contention and conditionally reverse the termination order, subject to reinstatement by the juvenile court depending on the outcome of compliance with ICWA.

STATEMENT OF THE CASE AND FACTS

On March 30, 2011, juvenile dependency petitions were filed alleging that Adam D. and Matthew D., then three years old, came within the provisions of Welfare

and Institutions Code section 300, subdivisions (b) and (g).[1] It was alleged under subdivision (b), that appellant had a chronic and ongoing substance abuse problem that impaired her ability to provide adequate care for the children, in that she was arrested on March 11, 2011, for being under the influence of a controlled substance and continued to use illegal substances despite having completed residential and outpatient treatment at least four times, and that she was engaged in a domestic violence relationship and the boyfriend had thrown things at her in the presence of the children. Under subdivision (g), it was alleged that appellant had left the children with the maternal uncle approximately seven months before without aid for daily care and support. The Indian child inquiry attachment to the petition indicated that the child "may have Indian ancestry" based on appellant having told the social worker that she "may have Blackfoot Indian Ancestry." Appellant signed a parental notification of Indian status form stating that she might be a member or eligible for membership in the Blackfoot tribe, that she might have Indian ancestry, that the child might be a member of or eligible for membership in the Blackfoot tribe, and that one or more of her ancestors is or was a member of the Blackfoot tribe. Where the form asked for the name and relationship of the ancestor, appellant wrote "have to look in to that still."

According to the detention/jurisdiction report, signed on March 30, the twins had been living with appellant's brother Dustin and his girlfriend, Kalen, for about six months: Appellant initially brought them to stay for the weekend, but she did not return for them and they had remained with their uncle ever since. On March 11, appellant reportedly arrived unannounced at the Ujima East Program, where she had completed a drug treatment program in 2009. She said she had sent her sons to live with her brother in Martinez because her boyfriend "can be mean and threw things at her in front of the children." Appellant was visibly upset, having either a panic attack or an asthma attack, and said her boyfriend had taken her medication and would not give it to her.

[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Appellant's behavior was erratic. Her boyfriend, Raymond Juarez, was in the car while appellant was inside.

Interviewed on March 15, appellant's brother said that appellant had been arrested on March 11 for being under the influence. Appellant had not been involved in the children's care "for months" and did not provide any provisions for their care. Although she had come to the house the week before, she had not asked for the children back "in months." Dustin said that appellant had had substance abuse issues on and off for years, and had been in and out of rehabilitation programs; that she was involved in a domestic violence relationship and her boyfriend was a convicted felon; and that she was "technically homeless" although she had been living with the boyfriend for some time. Dustin was concerned about his legal responsibility for the children and the social worker said it would be necessary to pursue guardianship to be able to enroll the children in preschool, obtain ongoing medical care, and ensure the children's safety if appellant could not provide for them. The social worker observed the children to be healthy, happy and bonded with Dustin and Kalen.

Dustin and Kalen began the process of obtaining legal guardianship, but when their friend attempted to serve notice on appellant at Raymond's home, Raymond threw the papers in the friend's face; Kalen told the social worker that they had been receiving threatening text messages from appellant and Raymond ever since. Kalen said that she and Dustin were afraid for the children because Raymond is a violent person and they did not know what he would do. They went to the Independent Living Skills Program (ILSP) office, where they met with Dustin's former worker, a deputy sheriff and the social worker. The social worker worked with Dustin and Kalen on a safety plan for the weekend, and witnessed a text from appellant threatening to come and get the children. The social worker called appellant and explained the need for the guardianship in order for Dustin and Kalen to enroll the children in school and obtain medical and dental care for them. Appellant said she loved the children and did not want to lose them, but acknowledged that she had left the children with their uncle because she was homeless and in a domestic violence relationship and did not feel she could care for the children,

and that she still felt this way. The social worker encouraged appellant to enter treatment for her ongoing substance abuse problem, but appellant insisted all she needed was to obtain stable housing. When the social worker explained that appellant could either assist with the guardianship in order to protect the children or have the juvenile court become involved and remove the children from her custody, appellant agreed to go along with the guardianship. The social worker informed appellant of the court hearing on March 25, and scheduled a meeting with her for March 23 to discuss the situation and provide resources and referrals for housing and substance abuse services.

On March 23, Kalen called to tell the social worker appellant did not intend to come to the scheduled meeting. The social worker received several calls from a man claiming to be appellant's boyfriend, wanting to know when the appointment was, and the social worker told him this information was confidential. Appellant called, asking what they would be talking about at the meeting, became emotional and asked to reschedule the meeting for the next day.

On March 24, the social worker and unit clerk received more calls from appellant's boyfriend, wanting to know what time appellant was supposed to come for her appointment; again, he was told the information was confidential. In one call, the boyfriend claimed to be an Antioch police officer calling to inform the social worker that appellant was driving a stolen vehicle. Appellant called several times, vacillating about whether to come for the meeting, and did not appear.

On March 25, Kalen reported that appellant had resumed making threats, was driving around in a stolen vehicle, and was under the influence. Appellant had attended the court hearing on the guardianship, appeared to be under the influence and had drugs with her that appeared to be methamphetamine. The court did not grant the guardianship because appellant said the children's father, Matthew Douglas, had not been noticed. Kalen said the children's father's whereabouts were unknown and appellant had told the court this; Kalen also said the father did not have a relationship with the children and they did not know how to serve the father with notice as the court ordered. Appellant was

continuing to send threatening text and phone messages. The social worker encouraged Kalen to take the children away somewhere safe for the weekend.

Over the weekend, Kalen called the social worker, reporting that appellant had been calling all weekend and, according to a roommate at the house in Martinez, had come by several times, banging on the door and threatening to file a missing persons report with the police if she was not given access to the children. On March 28, the social worker went to Dustin and Kalen's house in Martinez and called the sheriff's office to ask for a police hold, which the responding officer signed. The social worker spoke with appellant on the phone and explained the situation; appellant was "not listening" and "extremely argumentative" but the social worker confirmed that appellant received the information about the time and place set for the court hearing.

The minors were ordered detained after a hearing on April 1. On April 11, the jurisdiction hearing was continued to April 25, and the court ordered supervised visitation for appellant. On April 21, appellant obtained a temporary restraining order against Raymond, for the protection of herself, the children, appellant's brother and his girlfriend. She subsequently obtained a second temporary restraining order on May 9.

On April 25, appellant pled no contest to the petitions, amended to dismiss the allegation under section 300, subdivision (b), that she had completed residential and out-patient treatment programs but continued to use illegal substances and the allegations under section 300, subdivision (g). The court sustained the petitions as amended.

In its disposition report filed on May 23, the Bureau recommended reunification services for appellant. The Bureau reported that the ICWA "does or may apply." Appellant told the social worker she may have Blackfoot Indian ancestry. The social worker contacted the children's maternal uncle and aunt, who stated that when they were children the paternal grandfather "mentioned possible Native American ancestry only in passing." The uncle and aunt "insist that they have no known tribal affiliation." The Bureau had been unable to question potential paternal ancestry because the alleged father's whereabouts were unknown.

The Bureau reported that on April 21, appellant was discharged from the program at Casa Ujima due to threats to her and the program by her boyfriend. There had been plans to discharge appellant to another program in Oakland, but it "appear[ed] that [appellant] may have undermined that option." The social worker connected appellant with an in-patient program at the Rectory but appellant decided to try to enter a program at Wallom House in Pittsburgh instead. She told the social worker that this program would not accept her because she had a restraining order against her boyfriend. Appellant stayed with several friends, one of whom she referred to as her "temporary sponsor." This person notified the social worker on April 29 that appellant had stolen her truck and wallet. Appellant was arrested for vehicle theft on April 30, but released on site. She told the social worker her friend had allowed her to borrow the truck.

Between April 21 and May 13, appellant gave the social worker six different telephone numbers as she moved from place to place. Each time the social worker tried to contact appellant, the telephone was answered by someone who was "very upset" with appellant and alleged she was again engaged in substance abuse. On May 13, appellant told the social worker she was not staying at "Love A Child" and wanted to bring a bag of clothing for her sons for the worker to give to Dustin. Appellant came to the office with two Love A Child residents she described as old friends, left the clothing and asked to contact the boys. The social worker took the number of one of appellant's friends and said the children would call that evening. Dustin later told the social worker that the call took place and that later in the evening the woman whose phone appellant had used contacted him to say that appellant had left the program and might be in the company of Raymond. The next day, a friend told Dustin he had seen appellant leave her mother's home with Raymond.

The social worker reported that appellant had had a troubled childhood—she, her twin sister, and their younger twin brothers—had been removed from their parents' custody when appellant was 12 years old and remained in foster care until they reached the age of majority, except for one of the twin brothers, who died at age 13 from inhaling aerosol cans. The social worker believed appellant had made strong attempts to make a

decent life for herself but had no interest in entering another treatment program. She was again spending time with Raymond despite her restraining order against him. Appellant had "extremely limited resources," but she had the love and support of her siblings—the brother having expressed willingness to raise her children to the age of majority if warranted, and the sister having expressed interest in providing respite care—and the social worker believed appellant loved her children and "could possibly make positive changes in her life."

At the disposition hearing on May 23, the court questioned why a permanent restraining order should be granted when appellant was continuing to see Raymond. Appellant explained that she had been having trouble getting into a program and would be homeless if she completely left the house where Raymond lived, but that she tried to be there when he was not, and that she had been kicked out of a treatment program because she had a restraining order against Raymond. The court rejected this explanation, but issued the restraining order. The court adjudged the children dependents of the court and ordered supervised visitation for appellant a minimum of one hour, twice a month. Appellant's reunification plan required her, among other things, to successfully complete a domestic violence prevention program, participate in the children's mental health treatment as recommended by the therapist, participate in random drug/alcohol testing and achieve negative tests for six months, complete an inpatient substance abuse treatment program, obtain stable and suitable housing for herself and the children, initiate monthly contact with the social worker, and complete regularly scheduled visits with the children. The six-month review hearing was set for November 7.

On November 4, the social worker submitted a memorandum reporting on the family's current situation and requesting a four-week continuance of the hearing because he had been unable to complete the report in time for the six-month hearing. The social worker stated that appellant had failed to make herself available for drug testing or services, that the social worker had received reports that appellant resumed living with Raymond immediately after the May 23 hearing, that she was continuing drug use, and that she might be homeless. The children were doing well, happy and comfortable in the

home of Dustin and Kalen, who were open to adopting them if that proved to be the most appropriate permanent plan.

The six-month review hearing was continued twice and eventually took place on February 9, 2012. In the Bureau's status review report, the social worker related that appellant had not drug tested, made herself available for services, or attempted to contact or visit the children since the last hearing. The social worker had last spoken with her on June 1, when she was allegedly driving herself to a domestic violence program. Appellant's speech was "somewhat tangential" and became increasingly "slurred and hurried." When the social worker asked if she was under the influence of any substance, appellant told him to stop yelling at her and abruptly ended the call. She had not contacted the Bureau since, and to the social worker's knowledge had not entered a domestic violence or drug treatment program. The children continued to reside with Dustin and Kalen, who demonstrated being extremely devoted to the children and ensuring they were safe and well-cared for. The children were exhibiting some problematic behaviors at preschool, in particular Matthew engaging in negative attention seeking behaviors due to a perception that Adam was "better received" than Matthew. The children and their care providers were being referred for therapeutic behavioral services. Dustin and Kalen reported that appellant continued to be involved with Raymond and continued her substance abuse. The Bureau submitted a declaration of due diligence documenting its unsuccessful efforts to locate appellant at various addresses, including the one she provided when she was incarcerated on November 4, 2011. The Bureau recommended that the court terminate reunification services and set a section 366.26 hearing.

Appellant was not present at the February 9, 2012 hearing, and her whereabouts were unknown. Appellant's attorney stated, "I have, unfortunately, not had any contact with my client, and so I will be objecting for the record." Counsel for the children supported the Bureau's recommendation. The court found that the Bureau had exercised due diligence in attempting to locate appellant. Noting that appellant had done nothing on her case plan and had not made herself available for visitation, the court stated that it

could not conclude there was a substantial probability the children could be returned with six more months of services and it was "certainly" in the children's best interest to set a section 366.26 hearing. The court ordered termination of reunification services, set the hearing for May 24, and directed the Bureau to make every effort to serve appellant notice of the hearing and the clerk to mail to her last known address notice of her right to file a writ petition to dispute the setting of the 366.26 hearing.

As of the end of March, process servers had been unable to locate appellant or the alleged father, and determined neither was in custody. Service was made by publication for the requisite period.

On May 24, the Bureau filed a memorandum describing the children's positive placement and relationship with the caregivers, and recommending a permanent plan of adoption by Dustin and Kalen. The Bureau also requested a three-week continuance of the section 366.26 hearing. The court found adequate notice had been provided to the parents and continued the hearing to June 11.

On June 7, appellant's attorney filed a motion to withdraw as counsel of record, stating that her family was moving out of state in June due to her husband's employment; that her withdrawal would not be detrimental to appellant because appellant was given proper notice of the hearing and did not respond; and that if appellant did participate at the hearing, new counsel could be appointed for her.

The Bureau's report for the section 366.26 hearing stated that since the last hearing, appellant had made two unannounced visits to the children's placement and on both occasions the care providers found her to be "clearly in an altered state." She was not allowed to see the children. The children had been having supervised visits with the maternal grandmother, but these were discontinued because the grandmother was continuing her substance abuse and was under the influence of a mind altering substance. The care providers were "unwavering" in their commitment to adopt the boys, despite the challenging behaviors the boys had demonstrated. The Bureau viewed adoption by Dustin and Kalen to be in the children's best interest but requested a 180-day continuance for an adoption home study to be completed.

On June 11, the court granted appellant's attorney's motion to withdraw and another attorney accepted representation of appellant. The court found notice had been provided to the parents. Counsel for the children requested that the matter be continued only 90 days for the adoption study, as the care providers were anxious to move forward. The matter was set for November 26, 2012. This date for the section 366.26 hearing was confirmed at a hearing on September 10.

The Bureau's report for the November section 366.26 hearing related that appellant had contacted the social worker on September 28, requesting visits with the children. Appellant said she had been released from custody about two weeks before, had entered La Casa Ujima on September 20, and was on three years' probation. On October 8, the children's therapist told the social worker it had taken the children a long time to adjust and she " 'absolutely' does not recommend the children seeing their mother unless she was receiving reunification services." According to the Bureau, the boys had been living with Dustin and Kalen for approximately two years and identified them as their parents, and the prospective adoptive parents were committed to providing the boys with a permanent and stable home. The Bureau recommended terminating parental rights and freeing the children for adoption.

On November 26, appellant's new attorney filed a motion to continue the November 26 hearing. In his declaration, executed on November 20, the attorney stated that appellant first contacted him on October 29, and advised him that she had been incarcerated from April 17 until August 15, 2012, and had not been transported for the previously set section 366.26 hearing on June 11. Appellant told counsel that she was residing at the La Casa Ujima residential program, which she had entered on September 20. Counsel stated that he had not received any discovery from appellant's prior attorney and had tried to reach her unsuccessfully, then learned she was no longer residing in California. He sent a discovery request form to the Bureau on October 30, and eventually received the material on November 17. He referred to a case note dated June 8, 2012, which indicated the social worker was aware that appellant was incarcerated at the time of the June 11 hearing. He had not been able to completely

review the entire "1+ inch thick package of Discovery" or review it with appellant, and he was scheduled for eye surgery on November 21, which would impede his reading vision for an unknown length of time until he could obtain new eyeglasses. Appellant had informed him on November 19 that she wanted to file a motion for modification. Counsel requested a continuance for a reasonable amount of time to permit him to review the discovery, prepare the case for contest, and file a motion for modification if appropriate.

Appellant was not present at the November 26 hearing; her attorney told the court he did not know why she was not in court, that she was in a program, he had talked to her the week before and she was planning to attend. The Bureau objected to continuing the hearing, noting that although counsel had had difficulty obtaining discovery from appellant's former attorney, he had been appointed on June 11 and did not contact the Bureau about obtaining discovery until October 30. Counsel for the children objected strenuously to the request for a continuance, arguing that this was the second setting of the section 366.26 hearing and the children needed permanency. Appellant's attorney, in turn, argued that at the first setting of the section 366.26, the Bureau only asked for a continuance, and that the Bureau caused a problem by not having appellant brought to the June 11 hearing, when he was appointed, because he did not know anything about appellant's wishes in the matter.

The court denied the continuance, explaining that the children had been removed from appellant's custody more than a year and a half before, and had been living with the care providers even before this; that appellant had been given notice of the prior section 366.26 hearing date; that appellant had not actively or impliedly indicated she was interested; and that continuing the matter would be inconsistent with the children's best interests. The court proceeded to terminate appellant's parental rights as well as those of the alleged father and to find the permanent plan of adoption appropriate.

Appellant filed a timely notice of appeal on December 13, 2012.

DISCUSSION

I.

Appellant contends the trial court abused its discretion and violated her constitutional right to be heard in denying the motion for a continuance to allow her to file a petition for modification, which was her only means of presenting "important changed facts upon which reunification could have been based." The changed circumstances to which she refers are her release from custody and entry into a drug rehabilitation program.

"Section 352 provides that a continuance shall be granted only on a showing of good cause and shall not be granted if it is contrary to the minor's best interests. '[T]he court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.' (§ 352, subd. (a).)" (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810; *In re J.I.* (2003) 108 Cal.App.4th 903, 911-912.) Although a juvenile court has discretion to grant a continuance upon a showing of good cause if it is not contrary to the best interest of the child (*In re Mary B.* (2013) 218 Cal.App.4th 1474, 1481, "[c]ontinuances are discouraged in dependency cases." (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604; *In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.) We review the denial of a continuance for abuse of discretion. (*In re Giovanni F.,* at p. 605; *In re Ninfa,* at p. 811.)

The basis for the request for a continuance in this case was that appellant's attorney did not have sufficient time to review the discovery in the case and determine whether to file the petition for modification appellant wanted him to file. Counsel lacked preparation time, he declared, because appellant did not contact him until October 29, he did not receive the discovery until November 17, and he was scheduled for eye surgery on November 21, only a few days before the November 26 hearing date. But counsel had been appointed on June 11, and despite his unsuccessful efforts to obtain the discovery from appellant's former attorney, he did not contact the Bureau until October 30. Neither counsel's delay in obtaining the material nor appellant's delay in contacting her attorney

establish good cause for continuing a hearing that had been set for June 11 and continued to November, with the new date confirmed in September.

Appellant took no part in her children's lives or in the reunification services she was offered throughout the reunification period. At the time the court terminated reunification services in February 2012, appellant's whereabouts were unknown despite efforts by the Bureau to find her. Between that hearing and the June 11, 2012 section 366.26 hearing, she made two unannounced visits to the children's placement and was not permitted to see them because she was "clearly in an altered state." She did not contact the Bureau from June 2011 until September 28, 2012, and she did not contact her attorney until October 29, 2012. Although appellant was apparently incarcerated in April 2012, she was released on August 15, and still did not contact the Bureau until the end of September or her attorney until the end of October. At this late date, with the children having been out of her custody for nearly two years and the section 366.26 having been set for many months, the trial court did not abuse its discretion in denying a continuance.

"A parent's rights to the care and companionship of her child are, of course, compelling. But the child's rights to a stable and loving family are equally compelling, and in any decision regarding the child's custody, the two must be balanced. The balance between the parent's and the child's rights shifts after the child has been removed from the parent's home for a substantial time, owing to abuse or neglect by the parent, and the parent has failed to correct the problems which led to the removal. (*In re Marilyn H.* [(1993)] 5 Cal.4th [295,] 307.) Accordingly, under California law, after reunification services are terminated in a dependency proceeding, the focus of the court's concern shifts from assisting the parent in reunification with the child to securing a stable new home for the child. (*Ibid*.)" (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609-610.) The only basis for a petition for modification that appellant offers in support of her argument is that she had entered a drug treatment program in September 2012. At best, this suggested "changing circumstances"—hardly the "changed circumstances" that could have justified the court vacating its prior orders and reinstituting reunification services at this stage in the case. (See *id.*, 24 Cal.App.4th at p. 610.)

Recognizing that a continuance may only be granted if it is in the children's best interests, appellant urges that the continuance she requested would not have affected the children's placement or significantly delayed resolution of their custody status because they were living in the home where they would remain if they were adopted, and the adoption was not imminent because the adoption study had yet to be completed. What appellant ignores, however, is that her petition for modification would have asked the court to reinstate reunification services that appellant had ignored for the entire reunification period—essentially asking the court to start at the beginning a process that, under the governing statutes, was at the required point of completion.

Appellant's primary complaint, and the basis of her due process claim, appears to be that the denial of the continuance prevented her from presenting to the court the changed circumstances upon which she wanted to base a petition for modification. Once the juvenile court has terminated reunification services and set a section 366.26 hearing, the only available mechanism for a parent to attempt to resurrect reunification efforts is through a section 388 petition for modification based on changed circumstances. (*In re Marilyn H., supra,* 5 Cal.4th at pp. 309-310.) Stressing the established fundamental constitutional interest a parent has in the care and companionship of his or her child (*id.*, at p. 306; *Stanley v. Illinois* (1972) 405 U.S. 645, 651) and the due process requirement of a meaningful opportunity to be heard (*Adoption of B.C.* (2011) 195 Cal.App.4th 913, 924-925), appellant asserts that by denying the continuance to enable her to file a section 388 petition, the court prevented her from "presenting important changed facts upon which reunification could have been based" and "presenting evidence regarding changed circumstances that might have prevented her loss of [parental] rights and the splitting apart of her family."

Appellant's due process rights were not violated. Far from being denied an opportunity to be heard, appellant absented herself from every court hearing after the disposition hearing in May 2011, including the November 26, 2012, hearing which her attorney expected her to attend and which she offered no explanation for missing. As we

have said, she has suggested no changed circumstances that might have allowed her to prevail on a petition for modification.

II.

Appellant additionally argues that the juvenile court erroneously terminated her parental rights without complying with ICWA by failing to give notice to the named tribe or Bureau of Indian Affairs. At the outset of the case, as indicated above, appellant reported to the social worker and on the parental notification of Indian status form that she, and therefore the children, might have Blackfoot Indian ancestry. In its disposition report, the Bureau stated that ICWA "does or may apply," relating appellant's report and her brother and sister's statement that their maternal grandfather had mentioned possible Native American ancestry in passing when they were children, but that they had no known tribal affiliation. The subsequent six-month status report and initial report for the June 11 section 366.26 hearing simply repeated the maternal uncle and aunt's statements. The final report for the November 26 section 366.26 hearing again repeated the uncle and aunt's statements, but this time concluded that ICWA "does not apply." [2]

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. § 1901 et seq.; *In re Holly B.* (2009) 172 Cal.App.4th 1261, 1266.) If there is reason to believe a child that is the subject of a dependency proceeding is an Indian child, ICWA requires that the child's Indian tribe be notified of the proceeding and its right to intervene. (25 U.S.C. § 1912(a); see also Welf. & Inst. Code, § 224.3, subd. (b).) [¶] Notice is a key component of the congressional

[2] Appellant claimed possible membership or eligibility for membership in the "Black Foot" tribe. The Blackfoot tribe is not a federally recognized tribe (78 FR 26384 (amended May 6, 2013), which would place it outside the purview of ICWA. (25 U.S.C. § 1903(8); § 224.1, subd. (a).) The Black*feet* tribe, however, is federally recognized. (78 FR 26384 (amended May 6, 2013). Respondent makes no suggestion that ICWA does not apply in the present case because appellant claimed connection to a tribe not subject to ICWA; instead, in describing appellant's statements, refers to the tribe as "Blackfoot (*sic*)," presumably recognizing the ease of confusion between tribes called "Blackfoot" and "Blackfeet."

goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the state court proceedings. Without notice, these important rights granted by the Act would become meaningless.' (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)" (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.) ICWA notice requirements are strictly construed. (*Id.* at p. 1397.)

Under ICWA, "if the court knows or has reason to know that an ' "Indian child" ' is involved in a ' "child custody proceeding," ' as those terms are defined in the Act (25 U.S.C. § 1903(4), (1)), the social services agency must send notice to the child's parent, Indian custodian, and tribe by registered mail, with return receipt requested. (25 U.S.C. § 1912(a).) If the identity or location of the tribe cannot be determined, notice must be sent to the Bureau of Indian Affairs (BIA). (*Ibid*.) No hearing on foster care placement or termination of parental rights may be held until at least 10 days after the tribe or BIA has received notice. (*Ibid*.)" (*In re W.B.* (2012) 55 Cal.4th 30, 48; see also § 224.2.) "An ' "Indian child" ' is an unmarried person under 18 who is either a member of an Indian tribe or is eligible for membership and is the biological child of a tribe member. (25 U.S.C. § 1903(4).)" (*In re W.B.*, at p. 49.) "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1).)

" 'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; see Cal. Rules of Court,

rule 5.481(a)(5)(A); *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258 [providing exhaustive analysis of the issue and concluding the 'minimal showing' required to trigger notice under the ICWA is merely evidence 'suggest[ing]' the minor 'may' be an Indian].) 'Given the interests protected by the [ICWA], the recommendations of the [federal] guidelines, and the requirements of our court rules, the bar is indeed very low to trigger ICWA notice.' (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408 [finding father's suggestion that child 'might' be an Indian child because paternal great-grandparents had unspecified Native American ancestry was enough to trigger notice].)" (*In re Gabriel G.* (2012) 206 Cal. App. 4th 1160, 1165.) On the other hand, more than a "bare suggestion that a child might be an Indian child" is necessary to trigger the notice requirements of ICWA. (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520-1521; *In re O.K.* (2003) 106 Cal.App.4th 152, 157.)

Here, appellant affirmatively stated that she and the children might be members of, or eligible for membership in, the Black Foot tribe, and that one or more of her parents, grandparents or other lineal ancestors is or was a member of this tribe, although she stated that she still had to "look into" which ancestor this was. Her brother and sister insisted they had no known tribal affiliation, but their statements that their maternal grandfather mentioned possible Native American ancestry when they were children, albeit "in passing," actually lent some support to appellant's statements. The Bureau did not explain why the exact same information from appellant and her siblings initially prompted it to state that ICWA "does or may apply" then, in later reports, formed the basis of a conclusion that ICWA did not apply. We are aware of no point in the proceedings when the question was actually presented to the court for determination. The parties agree that the Bureau never attempted to get information on the subject from appellant's mother and that no notice was sent to any tribe or to the BIA.

Respondent notes that *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538-1539, found there was no reason to know the child was an Indian child despite information that the great-great-great grandmother was a Comanche princess, presumably offering this case as an example of one in which even more detailed information than appellant gave

here was found insufficient. In *Shane G.*, however, there was information from a prior case involving Shane's sister, and stipulated testimony from the Comanche tribe, demonstrating that under the criteria used by the Comanche tribe to determine membership, Shane's ancestry would be insufficient. The information appellant provided, while lacking identification of a particular relative who was a member or eligible for membership, did identify a specific tribe and so was not as "vague and speculative" as that in *In re O.K, supra,*106 Cal.App.4th at page 156, in which the information claimed to trigger ICWA notice was that the child might have "Indian in him" because the family was from "that section."

Respondent suggests that because the credibility of the source should be considered in determining whether there is reason to know a child is an Indian child, it is "reasonable to presume" that the juvenile court considered only the statements of appellant's brother and not appellant's own statements. While respondent correctly observes that the court did not believe appellant when she offered excuses for being kicked out of a treatment program and for spending time with her boyfriend despite the restraining order, it does not necessarily follow that the court disbelieved appellant's assertion of Indian ancestry. It appears the Bureau did so, as it dropped reference to appellant's statements from its reports and related only those of her siblings, but the court made no findings on the ICWA issue at all. Similarly, while respondent urges that the court "could have" decided it was unnecessary to make any ICWA inquiry of appellant's mother because of her substance abuse, the record provides no basis for assuming the court even considered this issue. Appellant's failure to provide additional information after stating on the ICWA form that the identify of a specific ancestor "needed to be looked into" says less about her actual ancestry than about her overall failure to participate in these proceedings. The point of ICWA notice is not to protect any interest of appellant's: ICWA "is designed to protect Indian children and tribes notwithstanding the parents' inaction." (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 247,

258.)[3] Additionally, where there is a conflict in the information—as here, arguably, between appellant's more specific statement and her siblings' vague accounts—the Bureau had a duty to inquire further. (*In re Gabriel G., supra*, 206 Cal.App.4th at pp. 1167-1168.)

As the Bureau initially recognized, the information appellant provided was sufficient to require further investigation. To the extent that investigation revealed some conflict, the Bureau did not further investigate. The court itself made no findings concerning ICWA. Although the court's finding may be implied rather than express, "the record must reflect that the court considered the issue and decided whether ICWA applies." (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.) While an implied ruling will suffice, "at least as long as the reviewing court can be confident that the juvenile court considered the issue and there is no question but that an explicit ruling would conform to the implicit one" (*In re E.W.* (2009) 170 Cal.App.4th 396, 404-405), in the present case neither the reporter's transcript nor the court's minute orders reveal any reference to ICWA by the court. There is simply no basis for an inference that the court considered, much less decided, the matter.

"Because the juvenile court failed to ensure compliance with the ICWA requirements, the court's order terminating parental rights must be conditionally reversed. This 'does not mean the trial court must go back to square one,' but that the court [must ensure] that the ICWA requirements are met. (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 237; see *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705 ['The limited reversal approach is well adapted to dependency cases involving termination of parental rights in which we find the only error is defective ICWA notice'].) 'If the only error requiring reversal of the judgment terminating parental rights is defective ICWA notice and it is

[3] It is for the same reason that appellant's failure to raise the ICWA issue below does not forfeit the issue on appeal. " 'Because the notice requirement is intended, in part, to protect the interests of Indian tribes, it cannot be waived by the parents' failure to raise it.' (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 733.)" (*In re Antoinette S., supra*, 104 Cal.App.4th at p. 1408; *In re Gabriel G., supra*, 206 Cal.App.4th at p. 1166.)

ultimately determined on remand that the child is not an Indian child, the matter ordinarily should end at that point, allowing the child to achieve stability and permanency in the least protracted fashion the law permits.' (*In re Francisco W., supra*, at p. 708.)" (*In re Gabriel G., supra,* 206 Cal.App.4th at p. 1168, fn. omitted.)

We recognize that there is little likelihood remand for compliance with ICWA will ultimately affect the outcome of this case. Even if the twins are determined to be Indian children, ICWA states that in any adoptive placement of an Indian child, preference is to be given first to members of the child's extended family. (25 U.S.C. § 1015(a)(1).) This is the course being taken in the present case, with adoption by the children's uncle. We further recognize that the delay occasioned by this remand is antithetical to the fundamental objective of minimizing delay in dependency proceedings. (*In re A.G., supra,* 204 Cal.App.4th 1390, 1401).) But the Bureau's failure to adequately investigate the ICWA issue, and the court's failure to consider it, leave us no choice. (See *id.* at pp. 1401-1402.)

DISPOSITION

The order terminating parental rights is reversed and the case remanded to the juvenile court with directions to order the Bureau to further investigate appellant's claimed Indian ancestry. If it is determined that the tribe at issue is in fact the Blackfeet (rather than Blackfoot) tribe, and the information suggests the children are members, or may be eligible for membership, proper notice shall be provided. If, after

proper notice, no tribe indicates the children are Indian children within the meaning of ICWA, the juvenile court shall reinstate the order terminating parental rights.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.